

AL SMITHSON, Esq.
830 23rd Street
San Diego, California 92102

(619) 234-8729

Attorney State Bar No. 51611

Attorney for Material Witness:
ERMELINDO OLLUA-NAVA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(Honorable LOUISA PORTER)

UNITED STATES OF AMERICA,

) CRIMINAL CASE 08CR1551-JAH
) MAGISTRATE CASE 08MJ1421-POR
) DATE: June 10, 2008
) TIME: 2:00 P.M.

Plaintiff,

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
OF MOTION FOR ORDER
SETTING VIDEO DEPOSITION
OF MATERIAL WITNESS
ERMELINDO OLLUA-NAVA**

ROSALIO ALATORRE, Jr,
OSCAR IGNACIO BARRERA-SANTANA

1

Defendants .

I.

INTRODUCTION

The material witness, ERMELINDO OLLUA-NAVA, was arrested on or about May 1, 2008, and has remained in custody since that date.

Material witness ERMELINDO OLLUA-NAVA, seeks an Order by this Court under 18 U.S.C. Section 3144 and Federal Rule of Criminal Procedure 15 to have his testimony preserved in a video deposition as he has been unable to secure a surety under the conditions imposed by the government in this matter.

1 II.

2 UNDER EXISTING FEDERAL LAW

3 THE COURT IS REQUIRED TO ORDER

4 THE DEPOSITION AND RELEASE OF THIS WITNESS

5 18 U.S.C. Section 3144 provides that a material witness who is
6 unable to comply with any condition of release has the right to
7 have their deposition taken and thereafter be released:8 "No material witness may be detained because of inability to
9 comply with an condition of release if the testimony of such
10 witness can adequately be secured by deposition, and if further
11 detention is not necessary to prevent a failure of justice..."12 "Upon such a showing, the district must order [the witness']
13 deposition and prompt release." (Torres-Ruiz v. United States
14 District Court for the Southern District Court of California, 120
15 F.3d 933, 935 (9th Cir., 1997)) (emphasis in original).16
17 Further, Federal Rule of Criminal Procedure 15 (a) provides
18 the procedure basis for this motion for deposition:19 "If a witness is detained pursuant to Section 3144 of Title
20 18, United States Code, the Court on written motion of the witness
21 and upon notice to the parties may direct that the witness's
22 deposition be taken. After the deposition has been subscribed the
23 Court may discharge the witness..."24
25 Under such circumstances, "if the deposition would prove
26 admissible over any objection under the Confrontation Clause of the
27 United States Constitution or the Federal Rules of Evidence, the

1 material [witness] must be deposed rather than detained." (Aguilar-
 2 Ayala v. Ruiz, 973 F.2d 411, 413 (5th Cir. 1992)).

3
 4 The language of 18 U.S.C. Section 3144 is mandatory and
 5 requires material witness's deposition and release.

6
 7 Further, legislative history supports the position that the
 8 deposition and release of a material witness is mandatory.

9
 10 Section 3144: RELEASE OR DETENTION OF A MATERIAL WITNESS,
 11 reads (in part):

12 This Section carries forward, with two significant changes,
 13 current 18 U.S.C. 3149 which concerns the release of a material
 14 witness. If a person's testimony is that it may become
 15 impracticable to secure his presence by subpoena, the government is
 16 authorized to take such person into custody. A judicial officer is
 17 to treat such a person in accordance with Section 3142 and to
 18 impose those conditions of release that he finds to be reasonably
 19 necessary to assure the presence of the witness as required, or if
 20 no conditions of release will assure the appearance of the witness,
 21 order his detention as provided in Section 3142. However, if a
 22 material witness cannot comply with release conditions or there are
 23 no release conditions that will assure his appearance, but he will
 24 give a deposition that will adequately preserve his testimony, the
 25 judicial officer is required to order the witness's release after
 26 the taking of the deposition if this will not result in a failure
 27 of justice... 1984 U.S. Code Cong. and Adm. News, p. 3182.

1 In the instant case, in which the material witness will have
2 been incarcerated 41 days on the hearing date of this motion due
3 solely to his inability to secure bond, continued incarceration
4 violates the clearly stated intent of the Congress and the
5 straightforward rulings by the Court of Appeals (*Torres-Ruiz v.*
6 *United States District Court*) that such practices shall not be
7 permitted. Prolonged and continued incarceration clearly meets the
8 test of "exceptional circumstances" as referenced in *Torres-Ruiz v.*
9 *United States District Court*. In another case where the material
10 witness had been in custody for three weeks, the Fourth Circuit
11 held that continued incarceration with no prospective surety
12 available to post bond was an exceptional circumstance justifying
13 deposition and release of the material witness. (*United States v.*
14 *Rivera*, 859 F.2d, 1204, 1205 (4th Cir. 1988))

15
16 The circumstances in this case are similar to *Torres-Ruiz* and
17 *Rivera*, as the material witness in this case continues to be held
18 for no purpose other than to be a witness owing solely to his
19 inability to post bond. Because deposition serves as an adequate
20 alternative to his continued incarceration, **ERMELINDO OLLUA-NAVA**
21 has "an overriding liberty interest in not being detained as a
22 material witness when the deposition serves as an adequate
23 alternative to prolonged detention." (*Aguilar-Ayala v. Ruiz*, 973
24 F.2d 411, 419-420 (5th Cir. 1992)). Under the standards articulated
25 by the Court of Appeals, prolonged incarceration of **ERMELINDO**
26 **OLLUA-NAVA** merely because of his inability to secure bond thus is
27 an exceptional circumstance that mandates his immediate deposition

1 and release.

2

3 Exceptional circumstances also may be shown by the effect of
4 prolonged incarceration on the family of the material witness.
5 (*Torres-Ruiz v. United States District for the Southern District of*
6 *California*) In the *Torres-Ruiz* case, the material witnesses were
7 held more than 60 days and the Ninth Circuit held "the continued
8 detention of . . . material witnesses, whose testimony could be
9 adequately preserved by videotaped deposition and whose families
10 are suffering extreme hardship as a result of petitioner's
11 continued detention, is an exceptional circumstance justifying the
12 extraordinary remedy of mandamus. . ." and ordered the district
13 court to "schedule video depositions of petitioners at the earliest
14 possible date."

15

16 In the instant matter, counsel acting on behalf of the
17 detained material witness believes there will be no failure of
18 justice in requiring a deposition, and asserts that such is
19 supported by case law. It is true that the defendants have a
20 Constitutional right to confront and cross-examine witnesses
21 against them, but these rights must be balanced against the
22 Constitutional rights of the detained witness. In this matter, the
23 defendants are represented by counsel who has been notified of the
24 deposition and invited to ask all questions of the witness which
25 counsel believes will further their case.

26 ///

27 ///

28

1 III.
2
3 CONCLUSION

4 Under the clear meaning of 18 U.S.C. Section 3144, legislative
5 history and relevant case law, the ordering of a deposition and
6 subsequent release of this material witness is mandatory. With that
7 in mind, the witness respectfully requests this Court grant a video
deposition of his testimony and then order his release.

8 DATED: May 26, 2008

9 /s/ Al Smithson
10 AL SMITHSON, Attorney for
Material Witness
11 ERMELINDO OLLUA-NAVA

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28